92-1122

Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: EARLENE POLYAK

EARLENE POLYAK Petitioner

v

COMMISSIONER OF INTERNAL
REVENUE AND U.S.TAX COURT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EARLENE POLYAK
4063 Hood road
Palm Beach Gardens
Florida 33410
(407) 627-3564

55 pp

QUESTIONS PRESENTED

1. Is the Court of Appeals for the Eleventh Circuit proper jurisdiction for U.S. Tax Court trial held in Miami, Florida?

2. Is the Court of Appeals for the Eleventh Circuit denying due process in the transfer of TITLE IV REVIEW to the Sixth Circuit?

3. Should the Court of Appeals for the Eleventh Circuit provide due process protection under the Fifth and Fourteenth Amendment?

4. Is the Court of Appeals for the Eleventh obligated to give consideration to Case of First Impression for Public policy?

5. Is the transfer of case on letter and motion from the Department of Justice to biased Sixth Circuit conflict of interest?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	5
REASONS WRIT SHOULD ISSUE	8
CONCLUSION	17
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Page

Abrahams v Commissioner..... 17
United States Tax Court Reports
Bill of Rights.....12
Dept. Of Treasury,Pub 1 (Rev. 6 89
Deficit Reduction Act (1984)..... 8
Pub. 98-369, 98 Stat. 494 847-848
Helving v Bliss,..... 9
293U.S. 144 15191934)
Internal revenue Code.....10
7433(a)
Stringham v Commissioner.....15
369 U.S. 499(1962)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: EARLENE POLYAK

EARLENE POLYAK Petitioner

v

COMMISSIONER OF INTERNAL
REVENUE AND U.S. TAX COURT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue from this Supreme Court to review the orders of the United States Court of Appeals for the Eleventh Circuit in the question of federal jurisdiction in the transfer of 91-5206 and 91-5451 over objections, to the Court of Appeals to the Sixth Circuit pursuant to 28 U.S.C. §2101.

Cases Nos. 91-5206 and 91-5414 United States Court of Appeals for the Eleventh Circuit, and 92-2237(91-5206); 91-1314; and 92-1314; and 92-1212 and 2974-88 Commissioner of Internal Revenue and U.S. Tax court.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are set forth in Appendix A.The opinions of the Commissioner of Internal Revenue and the U.S. Tax Court are set forth in Appendix B,and the opinions of the United States Court of Appeals for the Sixth Circuit are set forth in a separate petition writ of certiorari per instructions for two brief

JURISDICTION

The order of the United States court of Appeals for the Eleventh Circuit was denied on August 26, 1992 and this writ of certiorari was timely submitted on October 30, 1992, and within ninety(90) days thereof.

This separate writ of certiorari on federal question of jurisdiction between two Courts is submitted pursuant to letter on on November 17, 1992 (App. B.p. 34).

The jurisdiction of this Court is invoked pursuant to Article III, sec. 2.in that the judicial power extends to all cases of law and equity; and citizens of different states.

The jurisdiction is invoked in 28 U.S.C. 2101; 28 U.S.C. 1443; 42 U,S.C. 1981; 1982, and 1983, Civil Rights Act of 9164, Title VI VIi, and as amended in Public law 102-166, in 1981 in the right of "(a)" party to sue, Fifth Seventh and Fourteenth Amendments.

The federal questions of jurisdiction were raised in all of the Courts.

CONSTITUTIONAL PROVISIONS

The pertinent portion of the Fifth Amendment provides as follows:

> No...person shall be deprived of life, liberty or property without due process of law;nor shall private property be taken for public use, without just compensation.

U.S.Const. Amen V Cl 4&4.

The pertinent portion of the Seventh Amendment provides as follows:

> ...where the value in controversy shall exceed twenty dollars, the right of a jury trial shall be prserved.

U.S. const. Amen. VII.

The pertinent portion of the Fourteenth amendment provides as follows:

> No state shall make or enforce any law which shall abridge the priveleges and immunities, of citizens of the United States; Nor shall any state deprive any person of due process of life liberty or property without due process of law.

U.S. Const. Amen XIV.

28 U.S.C. 1443: Removal Statute.

> (1) Against any person who is denied or cannot enforce in the courts of such state a law providing for equal civil rights of a citizen of the United States.
>
> (2) For any Act under color of authority deprived from any law providing equal rights.

42 U.S.C. 1981:

> All anended "(a)" person shall have the same right to sue...to the full and equal benefits of the laws.

42 U.S.C 1982:

> All persons in the United States shall have the same right in every state...to inherit purchase lease and convey real and personal property.

42 U.S.C. 1983:

> Every person, who under the color of any statute, ordinance, regulation, custom or useage of any state...subject orcause to be subjected any citizen of the United States or any other person within its jurisdiction therto the deprivation of rights and priveleges secured by the constitution and laws shall be liable at law and equity or some other proceeding for the parties.

28 U.S.C. 2403:

> In action...where the constitutionality of a statute affecting the public interest is drawn into question.

STATEMENT OF THE CASE

Petitioner petitions this Supreme Court to review the abuse of discretion and conflict of interest in the denial of due process by the United States Court of Appeals for the Eleventh Circuit in the transfer of TITLE IV REVIEW of Commissioner of Internal Revenue and the United States Tax Court, in disregard and denial of medical deductions under IRC 213(d)(2), and Individual medical deductions, under new legislation passesed in 1984 Tax Year(App.B.p.17).

Petitioner fulfilled all of the requirements of appeal to the Commissioner of Internal Revenue, but was denied due process of review of appeal to the Commissioner's disallowance of medical deductions under new 1984 legislation, by all of the Judges in the full Tax Court.

After the Tax Court denied due process of review of the full Court, Petitioner submitted

Title IV Review to the Court of Appeals for the Eleventh Circuit with one hundred ($100.00) docket Fee in 2974-88 (App. A.P.2).

Petitioner submitted motion to set aside as required in Title IV Review to the U.S. Tax Court.The Tax court filed motion to set aside order as an appeal and requested one hundred ($100.00 docket fee May 8, 1991(App A.p.3).

The Clerk of the Court of Appeals delayed filing Title Iv Review and forwarded as a notice of Appeal to the Tax Court with one hundred (100.00) dollars.

The Clerk of the Tax Court transmitted the record for filing to the Clerk of the Court of Appeals with exhibits on April 11, 1991 (App.A. p.6).

The Clerk of the Court of Appeals finally filed Title Iv Review after writ 91-5451, as 91-5206 March 7, 1991.

The Department of Justice wrote letter and submitted motion to transfer Title IV Review as Motion to Transfer appeal(App A.p.7).

The Court of appeals granted Department of Justice Transfer of TITLE IV REVIEW as an appeal from the istrict Court outhern District of Florida on November 11, 1991,which forced payment of taxes without due process.

The Court of Appeals for the Sixth Circuit fild TITLE IV REVIEW as an appeal from District Court No. 91-2237(See companion brief required).

On May 15, 1992, the Clerk of the Court of Appeals for the Eleventh Circuit sent letter admitting that envelop of exhibits had not been forwarded to the Sixth Circuit(App. A.p. 12).

91-2337 denied on August 3, 1992, and petition for writ of certiorari timely received in the Supreme Court on October 30, 1992.

Petitioner denied medical deductions for lodging in warm climate required to sustain life, and additional medical deductions allowed under IRC disallowed in this CASE OF FIRST IMPRESSION under new legislation in the Deficit ReDuction Act of 1984(App. B.17).

REASONS WHY WRIT SHOULD ISSUE

This writ of certiorari should issue in the presence of exceptional circumstances, warranting the exercise of this Supreme Court's discretionary powers, in the review of constitutionality of a case of FIRST IMPRESSION, in the denial of medical care in new legislation for liberalizations of the law in the taxpayer's favor, arising from public policy in Internal Revenue Code 213(d)(2) of the Deficit Reduction Act of 1984 Pub. 98-369,98 Stat. 494, 847-848.

The right of appeal should be preserved to the constitutionality of a substantive change in 213(e) redesigned section 213(d) by the Tax Equity & Fiscal Responsibility Act 182 passed in the Deficit Reduction Act of 1984, and new section 213(d)(2).

This section provides in certain situations lodging expenditures will be included in the definition of medical expenses for the purpose of section 213(5)(1)(b).

> 213(d) provides (1)...MEDICAL CARE ...(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,
>
> The Houes Committee Report states...The Committee believes that a medical deduction for lodging expenses should be allowed in appropriate cases. H Report. Part 2 at 1583(1984) to accompany H.R. 4170 (Pub. L. 98-369).

The Court of Appeals denies due process of the right of appeal in case where all of the requirements for appeal have been met in the appeal of disallowed medical deductions by the Commissioner of Internal Revenue,which has been denied due process of review by all of the Judges in the United States Tax Court.

In our interpretations of section 213(d)(2) we must keep in mind that pieces of new legislation that are liberalizations of the law in the taxpayers favor,(and/are) begotten from motivesof public policy...are not to be narrowly construed.Helving v Bliss, 293 U.S.144 151 (1934).

Petitioner demands Jeopardy assessment for delayed opinion 21/2years, and medical deductions delay subject taxpayer to award SEc.6673973 Abrahmans v Commn'.U.S. Tax Reports.

1. THE COURT OF APPEALS DISREGARDS MATTERS OF LAW AND FACT IN JURISDICTION IN DENIAL DUE PROCESS IN RIGHT OF APPEAL RULE 3FRAP

The Court of Appeals disregards matters of fact and law in transfer to Sixth Circuit and due process of appeal Rule 3 FRAP and deprivation of civil and constitutional rights and laws.

Title III Federal Rules of Appellate Procedure provides ...the original record shall be transmitted to the first court....

Petitioner submitted Title IV REVIEW of intentional disregard and discrimination against review of appeal from the disallowance of medical deductions under IRC 213(d)(2) to the Court of Appeals for the Eleventh Circuit pursuant to Internal Revenue Code Sec. 7433(a) 26 USC.

> Section 7433(a) IRC allows a taxpayer to bring a civil action ...in connection with the collection of any federal tax, an officer or employee of the IRS recklessly or intentionally disregards any provision of the Internal Revenue Code or any rgulation promulgated thereunder, Additionally-administrative remedies exhausted as required by 26 U.S.C. Section 7433(d)(1) and Treasury Regulation Section 301.7433(1)(d)

The Court of Appeals disregarded matters of fact and law in forwarding TITLE IV Review as appeal to the U.S. Tax Court May 8, 1991.

But the Tax Court forwarded the ORIGINAL RECORD with original exhibits to the Eleventh Circuit on April 11, 1991.

The Special Trial Judge determined jurisdiction when in the disregard of filing Petitioner's Motion to Transfer Case back to Detroit, after she discovered that records were not forwarded from Detroit, and submitted motion on November 28, and again on December 1, 1992.

> If you need documents which have been given to the Internal Revenue to support your claim, you should ask government lawyer to bring them to court so that you can offer them in evidence of your claim. Where original documents are lost you may offer copies ...IRS. Pub. 1(REv 6-89).

Petitioner maintains year round residence in Florida since December 1981, she asked for transfer of this case to Florida due to necity of being in warm climate during cold month and protection is provided under Fifth and Fourteenth Amends to due process of the laws.

"As a taxpayer, right to be treated fairly, professionally, promptly and courteously by the Internal Revenue Service." Bill of Rights. Department of Treasury, IRS Pub 1(Rev 6-89).

2. THE TAX COURT FINDS INTERNAL REVENUE DENIAL OF MEDICAL DEDUCTIONS CASE OF FIRST IMPRESSION UNDER NEW LAW 1984

Petitioner contends that adverse opinion in disregard of new legislation in 1984 in case of First Impression and issued delayed opinion of trial in Miami, Florida on December 1, 1988, over two (2) years denial of due process in violation of Rule 182(b) U.S. Tax court and Rule 3 FRcivP. (Removed from Small Tax Case).

> ...a special trial judge who conducts the trial in a case (other that a small tax case) where the small deficiency nor the amount claimed exceeds five thousand dollar ($5000.00).shall as soon therafter as practible, prepare proposed findings of fact and opinion, which shall be promptly reported to the Chief Judge.

The Judge construes issue of disallowed deductions in medical care by Commissioner as three pronged case in which Petitioner meets two prongs (1) "sojurn in Florida was primarily

for and essential to the mitigation of her heart and lung ailments,and (2) She did not enjoy any significant element of pleasure due to her disabilities, to satisfy prong three, but designates middle prong as second prong, and(3) the application of the second prong in determining whether medical care is provided by a physician in a licensed hospital or medical care facility "is not clear cut."

The Tax Court Judge admits that "the language of the of the statute is ambiguous as to whether incidental medical care, while seeking a more favorable climate for mitigation of an illness,would satisfy the second prong.

Petitioner contends that Judge contrues issue of medical care for life saving in the diagnosis, cure, mitigation, treatment,or prevention of disease, or for the purpose of affecting any function of the body as merely incidental medical care, after Physicians recommend the treatment of the above with favorable climate.

Physicians' in Michigan recommend treatment of heart disease and lunge damages in a warm climate.

Petitioner contends that she should not have to pay more money than others to live. She must pay lodging for travel trailer especially equipped with the necessary Oxygen, air-conditioner, heat,water,lights, and telephone for emergence heart treatment in nearby hospital for emergency treatment for the function to keep the body alive.

On November 6, 1992, Petitioner was subjected to such an emergency treatment with Oxygen.intervenously injection of nitroglycen for two days,with hephrin and other life saving treatment in the intensive care unit of nearby Cardiac Unit of hospital. This is not incidential medical care, but life saving the function of the body.

"The committee believes that a medical expense deduction for lodging should be allowed in appropriate cases." H. Rept. 98-432, Part 2

at 1583(1984) to accompany H.R. 4170Pub. L.98-369.

In addition to denying life saving treatment in specially equipped travel trailer in warm climate prescribed by physicians, the Judge has disallowed deductions allowed by IRC for others disabled in intentional discrimination against disabled such, air-conditioner in the home. after the IRS depriciated deductions, the Judge disallowed prescription medications(evidence in Detroit records not forwarded to Miami) emergency telephone air-conditioner detachible from trailer with proof of special installation for medical care, and as captial improvement air-conditioner in home, which had been figured by Tax consultant.

The Judge disregards new legislation 1984 with IRC 1939 to Stringham v commissioner, 12 T.C. 580(1949) per curium 183 F 2d 579 (6th Cir 1950) in comparison, but reversed in Commissioner v Bilder, 369 U.S. 499(1962(3rd ci1981) The Judge disregards the fact that Mr.

is deceased,which may have prompted this new liberlization of the law in the taxpayer's favor as a matter of public policy pursuant to 28 U.S.C. 2403.

3. THE COURT OF APPEALS FOR THE ELEVENTH TRANSFERS CASE IN DISREGARD OF MERIT IN CASE OF FIRST IMPRESSION FOR PUBLIC

The Court of Appeals for the Eleventh Circuit transferred 91-5606 over Petitioner's objections and in disregard for merit in case for liberalization of taxpayers laws in case of first impression for the benefit of Public policy.A petition for rehearing still pending.

There is a national out-cry against the burden of expensive medical care and medications required by the disabled to sustain their life function of the body. It is unfair that the disabled pay more to live than other persons in our society.

The Court of Appeals for the Eleventh Circuit has transferred this case of first impression to the prejudiced Sixth Circuit.All pro se appeals are denied in docket control.

CONCLUSION

Petitioner seeks writ of certiorari to issue to return 91-5206 TITLE IV REVIEW to the original jurisdiction of the Eleventh Circuit and due process of right of appeal with relief in compensation for damages in denied deductions and Jeopardy Assessments, and in the alternative this Court rule on constitutionality of new legislation in liberlizations of the laws in the interest of public policy.

On the 24th day of November, 1992.

Respectfully submitted,
Earlene Polyak
4063 Hood Road
Palm Beach gardens,
Florida 33410 (407) 627-3564

Certificate of Service

I certify that a true copy of the pleading has been mailed to Mr. Joel Rabinovitz,Department of Justice, Washignton, district of columbia 20044,and the Solicitor General,Washington District ofcolumbia 20543.

Earlene Polyak

COUNTY OF PALM BEACH
STATE OF FLORIDA

_____ My commn'expires:
Notary Public

APPENDIX

In the United States Court of Appeals for Eleventh Circuit.

91-5206 TITLE IV REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES BOARDS COMMISSIONERS AND OFFICERS.

91-5451- Writ of Mandamus to file TITLE IV REVIEW.

Denied:August 26, 1992.

Before: TJOFLAT Chief Judge, and BIRCH AND DUBINA Circuit judges.

91-5206 Transferred and filed in the United States Court of Appeals on November 7, 1991 as 91-2237 denied August 3, 1992.

2974-88 TAX COURT decision from appeal of Commissioner of Internal Revenue on March 12, 1990.

2974-88 All of the appeals in the TAx Court exhausted and within ninety (90) days of Motion to Revise Decision

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: EARLENE POLYAK FILED AUG 26 1992

No. 91-5451

On Petition for Writ of Mandamus to the United states District court for the Southern District of Florida

BEFORE :TJOFLAT Chief Judge, BIRCH and DUBINA Circuit Judges.

Petitioner's petition for rehearing en banc of this Court's order dated November 1, 1991, denying her motion for leave to file a mandamus petition in forma pauperis treated as a request for reconsideration is denied.

NO SIGNATURE

Note: This U.S. Tax Court and Commissionar o Internal Revenue has never been in the U.S. Distrct Court in Southern District of Florida, and Petitioner has never applied forma pauperis in any Court.

BEST AVAILABLE COPY

No. 2794-88
UNITED STATES TAX COURT

EARLENE POLYAK

v

COMMISSIONER OF INTERNAL REVENUE

PETITION TO ENJOIN AND SET ASIDE AND MOTION TO FORWARD RECORDS

Petitioner moves to forward records in the above case to the United States Court of Appeal for the Eleventh Circuit for review of denial of Motion to Vacate Decision IRC 162 United States Tax Court, pursuant to TITLE IV REVIEW AND ENFORCEMENT OF COMMISSIONERS ORDERS AND OFFICERS, at Atlanta, Georgia 30303.

This Court denies due process of Motion to Full court, and Review of these motions by the full Court for a New Trial IRC 162 U.S. Tax Court.

Petitioner moves to enjoion and set aside alleged deficiency of six hundred forty-eight ($648.00) and any interest, and other charges denied in Motion to Revise and Vacate Decision On 4th day of March 1991 IRC 162 Tax Court

Respectfully submitted,

Earlene Polyak
4063 Hood road
Palm Beach Gardens
Florida 33410

Certificate of Service

I certify tha a true copy of this pleading has been mailed to Mr. W. Robert Abramatis, 114 Federal Building,114 Federal building Miami, Florida 33130.

Earlene Polyak

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DKT.NO(s). 2794-88
The enclosed documents Petition to enjoin and set aside and motion to forward records received 3/8/91 are returned unfiled

FORM AND STYLE
X improper joining of motions See Rule 54

STATUS OF REPRESENTATIVE
No entry

CONSOLIDATION
No entry

MISCELLANEOUS

X The record will automatically be forwar-by this Court to the Court of Appeals.The notice of appeals has been filed. A $100.00 filing fee is required.

Office of the Clerk

Date 3/ 8/91

Form no. 133
(Rev 9/90

UNITED STATES TAX COURT
Washington,DC 20217

APR 11 1991

Mr. Miguel Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forysth Street, N.W.
Atlanta Georgia 30303

Re: Alex L. Polyak and
Earlene Polyak
Petitioners-Appellants
Earlene Polyak
v
Commissioner of Internal Revenue
Docket no. 2794-88

Dear Mr. Cortez:

There is transmitted herein, under my certificate, the record on appeal in the above entitled case, together with, but separately cerified, the original exhibits.

Appeal is taken by the petitioner Earlene Polyak. Address of appellant is 4063 Hood Road, Palm Beach Gardens, florida 33410.

Counsel for the commissioner of internal Revenue are Shirley Peterson, Ass Attorney General, Tax Division United States Dept. ofJustice P.O. BOX 502 Washington D.C 20044, upon whom service of documents and papers in the court of apepals is to be made, and Abraham N.M. Shashy Jr. Chief counsel Internal Revenue Service.

Yours very truly,
Charles S.Casazza
Clerk

Enclosures (1) volume records
(2) Folder of Exhibits

No. 91-5206
U.S. DEPARTMENT OF JUSTICE
TAX DIVISION

April 24, 1991

Miguel J. cortez,Esquire
Clerk U.S. Tax court
for the Eleventh Circuit
56 Forysth Street
Atlanta, Georgia 30303-3147

Re:Earlene Polyak v. commissioner
(11th Cir. No. 91-5206

Dear Mr. Cortez:

We are transporting herewith for filing with your court an original and three copies of a motion to transfer the above appeal(TITLE IV REVIEW) to the United States court of Appeals for the Sixth Circurit. Please be submit the motion to the Court and advise of the action taken therto

This case is currently assigned to Joel Rabinovitz of this office, who may be reached at (202) 514-2944 or FTS 368-2944

We are forwarding copies of this let- and motion to the appellant, appeaing pro se.

Sincerely yours,
Shirley D. Peterson
Assant Attorney General
Tax Division

By:

Garv R. allen
Chief Appellate Section
Tax division
Department of justice
P.O. Box 502
Washington, D.C. 2004

No. 91-5206
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EARLENE POLYAK
Petitioner-Appellant APR 24, 1991

v

COMMISSIONER OF INTERNAL REVENUE
Respondent-appellees

MOTION TO TRANSFER APPEAL TO
COURT OF APPEALS HAVING PROPER VENUE

Comes now the Commissioner of Internal Revenue, appellee herein, by and through his counsel, and respectfully moves this Court to enter and order transferring the appeal in the above captioned case case to the United States Court of Appeals for the sixth circuit, and in support of this motion states as follows:

1. At the time Earlene Polyak (taxpayer) filed her petition jointly with her husband) in the United States Tax Court, the decision of which only taxpayer now appeals, she recited that she was a legal resident of Trenton, Michigan which lies within the United States Court of Appeals for the Sixth circuit.the Tax Court in its opinion, similarly found that the taxpayer was a resident of Michigan at the

time her petition was filed. Polyak v Commissioner., 94 T.C. 337 338(1990).

2. Section 7482(b) Of the internal Revenue Code provides that the proper venue for review os decision of the Tax Court is the United Sta tes court of Appeals for the Circuit which con tains legal residence of the Petitioner. For these purpose-s, the legal residence of the pettioner is determined as of the time the petition was filed in the ax Court SEc.7482(b).Becker v Commissioner 852 F. 2d 524(11th Cir).Although Section 7482(b) provides that the parties may stipulate in writing to have the appeal heard in a different Court of Appeals, here the parties have not stipulated(TITLE IV REVIEW). Accordingly, venue is proper in this Court , Becker v Commissioner, 852 F.2d at 525.

4. Since venue is improper in this court, this appeal (TITLE IV REVIEW) should be transferred to the circuit in which venue properly liesBeckler v Commissioner, 852 2d 526:Dorbush v Commissioner860 F.2d 611 612-615(5th Cir 1988):Alexander V commissioner, 825

F. 2d 499, 502(D.C. CiR1987).

Wherefore, the commissioner respectfully requequests that this Court enter an order tran sgerring the above-captioned appeal(TITLE IV REVIEW) to the United States Court of Appeals for the Sixth Circuit.

Stamped Gary Allen
Chief, Appellate Section
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044

No. 91-5206

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EARLENE POLYAK

FILED NOV 11 1991

V

COMMISSIONER OF INTERNAL REVENUE

Appeal from the United States Tax Court for Southern District of Florida

BEFORE: JOHNSON, HATCHETT and ANDERSON Circuit Judges

BY THE COURT:

Appellee's motion to transfer appeal to court of appeals having proper venue is granted.

This appeal is transferred to the United States Court of Appeals for the Sixth circuit.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

May 15, 1992

Leonard Green Clerk
United States court of Appeals
Sixth Circuit
538 P.O. & courthouse
5th and Walnut Streets
Cincinnati, Ohio 45202

91-5206

Dear Mr. Green:

Enclosed please find Mrs. Polyak's petition for rehearing en banc which was received in this office today. Also enclosed is an envelop of exhibits which were omitted in error when this appeal was transferred to the Sixth Circuit.

If this office can be of further assistance, Please advise.

Sincerely,

MIGUEL J.CORTEZ
Signed Margaret MacDonald
Deputh clerk

:mam
cc: Earlene Polyak
Encl.

U.S. DEPARTMENT OF JUSTICE
TAX DIVISION

APR 22 1991

Ms. Earlene Polyak
4063 Hood Road
Palm Beach Gardens Fl 33410

Re: No. 91-5206 (TITLE IV REVIEW)
Dear Ms, Polyak:

We have responsibility for representing the Government on appeal (TITLE IV REVIEW) is now assigned to the appellate Division, Department of Justice,Further correspondence including your brief should therefore be directed to this office at the address below.

Siccerely Shilrey peterson
Assistant Attorney General
Tax Division

By: Garry allen
Chief Appellate Division
Tax Division
Department of Justice
P.O. 502
Washington, D.C. 20044

cc: Miguel Cortez, Esquire
Clerk U.S. Court of Appeals
for the Eleventh Circuit
56 Forysth Street N.W.
Atlanta, Georgia 303-3147

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

October 15, 1991

John Cardone
Department of Justice
Tax Division-Civil Trial Nothern
P.O. Box 55, Ben Franklin Station
Washington, D.C. 20044
Re: 91-5206;Polyak v IRS
U.S Tax Court No. 2794-88

Dear Mr. Cardone:

Pursuant to your request,this letter serve as confirmation that Earlene Polyak has an appeal pending in this Court. Her notice of appeal was filed March 7, 1991 and is presently pending before the Court on Appellee's motion to to transfer appeal to court of proper venue and appellant's motion to correct the record and add exhibit and oral argument for denial of due process and writ of mandamus and grievance

If we can be of further assistance please advise.

Sincerely,
MIGUEL J. CORTEZ,CLERK
Signed Margaret Mac-
Donald Deputy Clerk

:mam

APPENDIX B

In the United States Tax Court an appeal to the Commissioner of Internal Revenue' s decision .. No. 2974-88

TRIAL: Miami, Florida

DATE: November 28, 1988

DATE: December 1, 1988

Decision: March 12, 1990

Before: Special Trial Judge: Marvin Peterson

22040 Small Tax Case;

Date Trial May 4, 1988
September 29, 1988

UNITED STATES TAX COURT

ALEX POLYAK AND
EARLENE POLYAK

March 12 1990

Petitioners

v

Docket No. 2794-88

COMMISSIONER OF INTERNAL
REVENUE

DECISION

Pursuant to the opinion of the Court filed March 12, 1990, and incorporating herein the facts recited in the respondent's computation, it is

Ordered and decided: That there is a deficiency in income tax from the petitioner income tax due from the petitioner for the taxable year 1984 in the amount of 648.00.

Entered

UNITED STATES TAX COURT

ALEX L. AND EARLENE POLYAK, Petitioners v.COMMISSIONER OF INTERNAL REVENUE Respondent.

Docket No. 2794-88 filed March 12,1990

1.Petitioner wife, under her physician's recommendation, spent the winter months in florida in order to mitigate her chronic heart and lung ailments. Held., lodging expenses while in florida are not deductable medical expenses under section 213(d)(2). Petitioner wife went to Florida to alleviate her chronic ailments, not to obtain treatment from a physician in a licensed hospital or equilvalent outpatient facility.

2. Petitioners made expenditures to repair the wooden bathroom floor in rental property they owned. Held,these expenditures are currently deductible under Section 162, not capital expenditures under Section 263.

Alex and Earlene Polyak, pro se

Carole Meisler, for the respondent.

GOFFE, Judge: This case was heard by Chief Special Trial Judge Marvin F. Peterson pursuant to the provisions of Section 7443A(b) of the Internal Revenue Code of 1986, and Rule 180,181 and 182.All section references are to the

Internal Revenue Code as amended and in effect for the year in issue unless otherwise indicated All Rule references areto the Tax Court Rules of Practice and procedure. the court agrees with and adopts the Chief Special Trial Judge's opinion which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

PETERSON,Chief Special Trial Judge:Respondent determined a deficiency in petitioner's federal income tax for the year 1984 in the amount of `945.00.

The issues to be decided are (1) whether petitioners are entitled to a medical expense deduction; and (2) whether petitioners are entitled to a current deduction for repairs made to rental property.

FINDINGS OF FACT

Petitioers were legal residences of Trenton, Michigan at the time this petition was filed. Petitioers timely filed a joint Federal income tax return for the year at issue.

Petitioners (Mr and Mrs Polyak) owned

several rental properties(sic two small fifty-year old houses)and incurred expenses relating to those two propertiesduring 1984. Petitioners also incurred expensesrelating to Mrs Polyak's medical problems in 1984. these expenses included expenditures for prescription medicines medical insurance premiums, transportation to and from Florida, lodging while in Florida, travel trailer depreciation, telephone expenses and air-conditioners installed in both tra el trailer and petitioner's Michigan home. At issue are the medical deductions petitioners claimed due to these expenses and deductions for expensses relating to rental income.

Mrs. Polyak underwent open heart surgery in 1979, since that time, she had continuing coronary artery disease and associated lung problems.She was hospitalized several times after surgery through 1984, and required Oxygen tank to assist her in her breathing. She also suffered from acute arthriits in 1984. Mrs Polyak's health problems causes difficulties when outdoor temperatures became extreme. She

BEST AVAILA

was advised by her doctors in Michigan to seek a warmer climate during the winter months. Because of this advice Mr. Polyak drove Mrs. Polyak to Florida in the fall of 1983 and flew back to Michigan, while Mrs. Polyak remained in Florida throughout the winter months.Mr. Polyak flew to Florida to drive Mrs Polyak back to michigan for the summer. Petitioners then repeated the process in the in the fall of 1984.

Mrs Polyak's Florida doctor was a Dr. Herman whom she saw twice during the five months she resided in florida in 1984. The fiirst appointment was in February and for an upper respiratory infection.The second appointment was in December and was a routine visit(sic bronchitis which would not respond to medication in Michigan and doctor told her "why don't you go on to florida, and son drove her)for renewal of medications(sic doctor only listed heart medications brought from Michigan and prescribed more antiboitics).Dr Herman became her physician when she was taken to a hospital(Humnna) emergency room in Florida during 1983. Dr.

BLE COPY

Herman was covering that emergency room for patients who did not have physicians and treated Mrs Polyak. Thereafter, she continued seeing him:however, he occasionally referred her to specialists as her need arose. Mrs. Polyak's physicians in Michigan did not refer her to any physicians in florida for medical care.

Mrs Polyak lived in a travel trailer which she parked at a K.O.A. campground in Palm Beach Gardens,Florida, during the five months she resided in florida in 1984. Petitioners expended é 1,426.00 in rental fees at the campground The traeel trailer was not was specicially equ iped equiped for Mrs Polyak, although it did ha e an air conditioner to alle iate her breathing problems(sic telephone E. OXygen tank within five monites of the cardiac unit of hospital).Petitioner's also installed an airconditioner in their home in Michigan in 1984 to help Mrs. Polyak's medical condition.

Due to her poor health Mrs. Polyak di/ not enjoy any significant element of personal pleasure, recreation or recreation or Vacation

BEST AVAIL

while she spent the winter in florida(sic away from family and friends).

Petitioners also claim deductions for expenditures made to rental properties they own. After concessions(Respondent did not concede) made at trial by respondentthe only rental expenditure for repair to a bathroom floor in Petitioner's New Boston rental property(sic old one bedroom house).The bathroom floor was a wooden floor anddue to water damage overthe courseof of many (50)rotted in several places so there was danger of someone falling through. Petitioners had a section of the floor thatwas most damaged cut out and replaced with similar materials.

OPINION

The first medical expense we will decide is the expenditure of él,126 for Mrs Polyak's lodgingwhile she was in Florida.Petitioners contend they may claim a medical expense for deduction under section 213(d)(2) for Mrs Polyak' lodging expense while she residedin Florida.

BLE COPY

Respondent contends that in order to item ize lodging expesnesas medical expenses under section 213 (d092) Mrs polyak must have been in Florida specifically to be treated by a physician who is working out of a licensed medical care facility.

Section 213(d)(2) was added to the Internal Revenue Code by Section 482(a) of the Deficit Reduction Act of 1984, Pub.L. 98-369, 98 Stat. 494, 847-848. Section 213 (d)92) applies to all taxyears beginiiing December 1, 1983, it is applicable to the year before us.

this a case of first impression for this Court. We have not has a prior occasion to interpret and apply section 213 (d)(2).

The Supremecourt considers issues of statutory construction from time to time and has set forth our rules as follows:In the interpretation of statutes, the function of courts is easily stated. It is contrue the language so as to give effect of the intent of Congress United States v American Trucking Company, 310 U.S. 534 542 (1940).

As early as 1949, Chief justice Taney stated "In expounding a statute,we must not be guided by a single sentence, but look to the provisions of the whole law and to its object and policy United States v The Heirs of Boisdore, 49 U.S. (8 Howard) 113, 122 (1849) See Pilot Life Ins. v Dedeaux, 481 U.S. 41,51(1987). Almost one hundred years later the Supremecourt Added "But Words are inexact tools at best, and for the reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination. Harrison v Northern Trust Co., 317, U.S. 476 479(1943). See Train v Colorado Public Interest Research Group. Inc, 426 U.S. 1, 10(1976). However, it is well settledthat the first step in statutory interpreprepreation is an analysis of the statutory language Relter v Sonotone,- 442 U.S. 330 339(1979

The Supreme Court summarized the importance of the statutory language as follows:

If the statutory language is unambiguous,

in the absence of "a clearly expressed legislative intent to the contrary,that language must ordinalril be regarded as conclusive. Consumer Product Safety Commn v GTE Sylvania Inc., 447 U.S. 102 108 1980 Of Course there is no errorless test for identifying or recognizing Plain or unambigiguous language, Also authoritative administrative construction should be given the deference to which the entitled absurbdresults are to be avoided and intenal inconsistencies in the statute must be dealt with. Trans Alaska Pipeline Rate cases 436 U.S. 631 643 (1979) Commissioner v Brown 380 U.S. 563 571(1965) We nevertheless beginwith the language of the statute

United States v Turkette,452 U.S. 576 58 1981.

In our intreprestaion of section 213(d)(2 we must keep in mind that pieces of new legislation that are liberalizations of the law in the taxpayer's favor,(and are) begotten from motives of public policy...are not to narrowly construed Helvering v Bliss, 293 U.S. 144, 151 (1934).

To facilitate our interpretation of the language of the statute, it is important to note the historiical development of the medical expense deduction as it relates to the issue before us.

Section 23(x) of the internal Revenue Code

of 1939, the predecessor of of section 213, was interpreted by this Court in Stringham v Commissioner, 12 T.C. 580(1949)affd. per Curiam 183 F 2d 579 (6th Cir 1950) to allow as a medical expense deduction, lodging expenditures similar to petitioner's in the case before us. In Stringham v commissioner, supra., the taxpayer's daughter , who suffered from vatrious chronic respiratory ailments, was sent to arizona from Cleveland Ohio, to seek a more favorable climate.There is no indication that a physician was consulted while the child was in Arizona. We found the lodging expenses to be deductible because the expenses were clearly incurred primarily for and essential to the cure and mitigation of the daughter's illness. Stringham v Commissioner,supra at 586.

the Internal Revenue Code of 1954 retained the language of Sextion 23(x) in section 213(e) however, Congress added Section 213(e)(1)(B) which provided that transportation expenses incurred primarily for the for and essential to medical care are deductable expenses.The

rationale in Stringham v Commissioner,supra, was reversed by the Supreme Court in Commissioner v Bilder,369 499(1962), and lodging expenditures were disallowed as a medical deduction in the interpretation of section 213(e0(1)(B0.

The facts in commissioner v Bilder,supra are similar to the facts in the case before us. The taxpayer resided in New Jersey and suffered chronic heart ailment having suffered four heart attacks during previous yeight years. He was advised by a heart specialist to spend the winters months in a warm climate.,The Taxpayer his wife, and their child spent the winter months in Fort lauderdale Florida, in a rental apartment. In applying section 213(e)(1) to these facts, the Supreme Court looked to the House and Senate Committee Reports for guidance. The committee Reports from the 1954 legislature state:

> The deduction permitted for transportation primarily for and essential to medical care clarifies existing law that it specifically excludes deduction of any meals and meals while away from home receiving medical treatment, if a doctor prescribes that a patient must go to Florida in order

> specific chronic ailments and to escape unfavorable climate conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons otheer than general inprovement of a a patient's transportation to Florida would be deductable but not his living expenses while there.

H Report. 1337, to accompany H.R. 8300 (Pub. L. No. 591) 83d Cong. 2d series A860(1954): S. Rep 1622 to accompany H.R. 8300(Pub. L. No. 591)83 cong. 2d Sess. 219-220(1954).

In applying section 213 e)(1) Justice Harlan stated:The committee Reports foreclose any reading of that porvision which would permit this taxpayer to take the rnetal payment for deducting lodging expenses under section 213(d)(2) is much narrorer than the allowance for deducting transporation expenses under section 213(d)(1)(B*.Transportation expenses are if the transportation is primarily for and ess ential to medical care.This is a one prong test. Lodging expenses are allowed if the medical care is provided in by a physisian in a licensed hos pital or equilevant ofand there is no significant element of personal pleasure recreation or vac- ation in travel away from home 213(d)(2).a tax payer must meet the three prong test to include

expenses in the definition of medical expenses.

In applying this test to the facts petitioners meet prongs one and three. Mrs Polyak's sojurn in florida was primarily for and essenti al to the mitigation of the heart and lung ailments. She did not enjoy any significant plra sure due to ther disabilities. The application of the second prong of determning whether medicare is provided by a physician in a licens ed hospital or medical care facility is not as cut,The language of the statute is ambiguous as to whether incidential medical care while seeking a more favorable climate for mitigation of an illness would satisfy the sec ond prong.We turn to legislative history to determine the intent of Congress in enacting this provision.

> The committee is aware of instances which an individual must travel away from home to receive medical care,this is be cause specialized care for a paticular disease not available and better care is available else where
> In some instances, as in the case of chemotherapt treatment for cancer patien the care can br given in a hospital or or hospital related facility on out

patient basis which is generaly less expensive treatment.Wjilw under present law the expenses of a hospital stay is deductable expenses of lodging incurred away from home during out patient medical treatment are not eligible for the deduction.the committee believes that a medical expense for lodging expesnse should be allowed in appropriate cases.

H.REpt 89-Part 2 at 1583 (1984) yo ac company H,R 4170(Pub.L.98-369).

The statutory language and its legislative history indicate thar congress in tended for lodging to be considered a deductable expense only when lodging is primarily for and essential to medical care by a physician provided in a hospita. or related facility.If the prupose of lodging is to alleviate a specific chronic ailment by seeking a more favorable climate,Connis v Bilder must be followed and such lodging expensitures are not deductible as medical expenses

Additionally Petitioner's contend they are entitled to a deduction under section 213 for 315 for prescription medicines, $80.00 for medical insurance premiums and 1581 for transportation to Florida.Respon

concedes these expenditures are allowableif sub-substantiated.

Deductions are a matter of legislative grace and petitioner's bear the burden of proving they are entitled to any deductions claimed in their return. If a claimed deduction is not adequau-ately substantiated we are permitted to esti mate expenses when we are convinced from the re cord that the taxpayer has incurred such expenses However, we must have some basis upon which an estimate may be made.

From the record we find that the expense for medicines has been substantiated. The dedu ction for insurance premiums has not and so ther is no bassis upon which an estimate may be made (sis receipts sent to Judge Peterson,but not used which comes from Michigan automible Insurance for medical care).The transportation expenses have been substantiated to the extent of $ 1,124(sic but only a partial amount claimed).

Petitioners claim a medical expense deduc-tion for a telephone installed in travel trailer.

Respondent disallowed this expense.The telephone was installed to quickly contact doctor(SIC EMERGENCY AMBULANCE WITH OXYGEN AND OTHER NEC ESSARY REVIVAL TREATMENT) The Supreme Court has intrepreted section 213 very narrowly and has ruled deductions for allpersonal living expenses incidental to medical treatment,other than the express exception of transportation,and must be denied.Telephone is a deductable personal expenditure under section 262.

Petitioners claim a medical deduction of $385 for an air-conditioner installed in the travel trailer and $ 1,580 for an air-conditioner installed in their home in Michigan.Respondent has disallowed this expense.The general rule is that a capital expensure made by a taxpayer may qualify as a medical expense deduction if it has its primary purpose the medical care of the taxpayer and is not related to the permanent improvement or betterment of the property. 2131(e0(1)(iii) Income tax Regs(sic Tax Consultant already figured amount claimed as medical expense).

This section of regulatuon gives an example of a deductable expense incurred for an air-condi tioner which is detatchable fron the property and purchases only for the use of the sick person(sic such as a travel trailer?),

Petitioner's expenditure for the air-conditioner in the travel trailed purchased December 14, 1984.the invoice shows a cost of $485.Of this amount, Petitioners claimed a medical expense deduction of $385 and capitaliz ed the balance of $100.00.the primary purpose of the tair conditioner in travel trailer was for medical careofMrs Polyak. However in order for air conditioner expenditure to be deductible as a medical expensepetitioners bear the burden of proving either air conditioner was detachable (sic Judge has just admitted taken from invoice of detachabele articels)or that the increase of the value to trailer was less than expenditure for the trailer.Petitioners have failed to do so.We hold that petitioners have not met their burden of proving they are entitled to deduction

We deny petitioners a medical deduction for air conditionrer in travel trailer in the amount of $385.00.The expense of the air conditioner installed in Michigan home was not substantiated in any way(sic with letter form heart specialist Dr Zacaris Ascunsion letter submitted to Judge). and so petitioners have likewise failed.

This regulation comes within the settled principle that treasury regulations are interpretations long continued without substantial change,applyingto unamended or substantially reencated statutes, are deemed to have the same effect as law. Helving v Winmill 305 US 79 83 1938).

Petitioners did not replace the entire bathroom floor,they repaired a portion of the floor since they cut out the damaged wood and replaced only those boards. The purpose to keep the property in an ordinarily effecient operating condition.A Current deduction is allowed under section 162.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON,DC 20543

November 12, 1992

Earlene Polyak
Plam Beacn Gardens
Florida 33410

Re: Earlene Polyak v commissioner
of Internal Revenue

Dear mrs Polyak:

Your petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and to the Eleventh Circuit sent by United Parcel Service on October 29, was received on october 30, 1992. The petition must be returned since one may not ask in a single petition for the Court to review judgments of two different court One may file a single petition pursuant to 12.2 to review multiple judgment from the same court.

Kindly redo your pleadings so that they constitute two separateand distinct petitions Your check in the amount of `300.00 is returned as well.

Very truly yours,

William K. Suter,
Clerk
By
Signed Francis larson

cc: Solicitor General